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International Refugee Law

Daniel Ghezelbash

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UNSW Law & Justice
UNSW Sydney NSW 2052 Australia

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1. INTRODUCTION

This chapter examines the way constitutional courts have drawn on international refugee law as an external aid to constitutional interpretation. International refugee law protects people who are seeking asylum from certain forms of persecution. In a global context in which states have been looking to limit their international obligations towards refugees and restrict access to protection, national constitutional protections have taken on new significance.[1]

The chapter begins by briefly describing the international legal framework protecting refugees and its key provisions. It will then set out the contemporary political context in which this law operates, where states are increasingly looking to minimise their obligations towards refugees and asylum seekers.[2] This includes attempts by states to block access to their territories, as well as limiting the rights of those who manage to circumvent those controls. Attention then turns to the way in which constitutional courts have responded to attempts to rely on entrenched constitutional provisions to challenge these restrictive policies, and whether international refugee and human rights law has been influential to the interpretation of these constitutional protections.

First, I examine how this has played out with respect to explicit constitutional clauses which grant a right to seek asylum, as well as attempts to read in implicit prohibitions on refoulement (removal or return) into other constitutional provisions. The indirect impact of

[1] Stephen Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?' (2018) 41 Fordham International Law Journal 383; Stephen Meili, 'National Constitutions and the Right to Asylum' in Catheryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 883; Eve Lester, 'National Constitutions and Refugee Protection' in Catheryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 258.

[2] A refugee is a person who is entitled to protection under relevant international, supra-national or domestic laws. An asylum seeker is a person seeking protection as a refugee, but whose claim for refugee status has not yet been assessed.

international refugee law goes beyond constitutional asylum provisions. Restrictive measures targeting refugees and asylum seekers push the boundaries of individual constitutional rights, and as such, in many jurisdictions around the world, litigation brought on behalf of refugees has played an important role in shaping the jurisprudence around the scope of such rights. I examine how this has played out with respect to interpreting constitutional guarantees in relation to due process and limits on detention.

The role of international refugee law in constitutional interpretation turns largely on the state's approach to drawing on international law in constitutional interpretation more broadly.[3] It is thus no surprise that the case studies examined in this chapter show that international refugee law has had the most direct impact in states where those obligations are directly incorporated into the constitutional framework. This includes states with constitutional provisions that give the entirety of their human rights obligations constitutional status,[4] as well as states with constitutional provisions that incorporate specific treaties, or which condition the valid exercise of certain constitutional powers on compliance with international human rights obligations.[5]

The impact is more inconsistent where international law can be drawn on as a binding interpretive tool,[6] or non-binding comparative practice.[7] In some states, international refugee law has been completely sidelined, with the courts taking the broad view that international law has no role in constitutional interpretation.[8]

Nonetheless, while the state's general approach to international law is an important factor, the highly politicised nature of asylum has given rise to instances where courts deviate from existing principles of constitutional interpretation, and earlier judgments.[9] The chapter concludes by arguing that the divergent approaches apparent in the examples examined turn on whether states take a universal or exceptionalist approach to interpreting the scope of national constitutional protections. This tension manifests in two ways: 1) whether courts are authorised

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[3] For a succinct summary of these various approaches, see Hannah Woolaver's contribution to this edited volume: 'The Role of International Humanitarian Law and International Criminal Law in Constitutional Interpretation'. See, also, the taxonomies set out in Vicki C Jackson, 'Constitutional Engagement in a Transnational Era' (OUP, 2010) (engagement, convergence and resistance) and Lester (n 1) (symbiosis, ambivalence and antagonism).
[4] See the discussion of the approach taken by the Ecuadorian Supreme Court below.
[5] See the discussion of the approach taken by the Supreme Court of Papua New Guinea below.
[6] See the discussion of the approach of the courts of Germany and India below.
[7] See the discussion the approaches of the US Supreme Court.
[8] See the discussion the approach of Australian High Court below.
[9] See the discussion of the approach of Indian Supreme Court below. Also see the discussion of the approach of the US Supreme Court, which has drawn on international human rights law in relation to the constitutional rights of citizens, but not unauthorised arrivals.

and willing to draw on international law directly or as a tool for interpreting domestic constitutional provisions; and 2) the related question of whether domestic constitutional provisions apply to everyone, regardless of their immigration status, or only citizens or those with regularised status. The trend in some states towards constitutional exceptionalism, facilitated by a turn away from drawing on international refugee and human rights law as interpretive tool, has undermined the ability of refugees and asylum seekers to access constitutional protections. At the same time, the risk is that the precedents set by such an approach can have ramifications for constitutional interpretation more broadly, including with respect to the rights of citizens.

2. INTERNATIONAL REFUGEE LAW

The granting of asylum to individuals in need of protection has deep roots in historical practice and religious teachings.[10] It was not until the early 20th century, however, that states began developing a treaty based international protection regime. These efforts were initially led by the League of Nations, in the aftermath of the First World War.[11] However, they were superseded by the treaties negotiated through the United Nations after the Second World War. In this section, I examine the key instruments and provisions which constitute the current international refugee protection regime. These include the 1951 Convention relating to the Status of Refugees,[12] the 1967 Protocol relating to the Status of Refugees,[13] as well as relevant protections in the human rights treaties and customary international law.

2.1. 1951 Convention relating to the Status of Refugees and its 1967 Protocol

The 1951 Convention relating to the Status of Refugees is the foundational instrument of the international refugee protection regime. Although its scope was initially limited to refugees displaced prior to 1 January 1951, this temporal restriction was removed by the 1967 Protocol. Despite this expansion, the *Refugee Convention* only provides for the protection of a narrow class of displaced persons fleeing persecution for particular reasons. Article 1A(2) of the 1951 Convention (read in conjunction with the Protocol), defines a refugee as a person who:

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[10] María-Teresa Gil Bazo, 'Asylum as a General Principle of International Law (2015) 27 International Journal of Refugee Law 3, 17-23; Lucas Kowalczyk and Mila Versteeg, 'The Political Economy of Constitutional Right to Asylum' (2017) 102 Cornell Law Review 1219, 1229-1238.

[11] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP, 4th ed 2021) 571-2.

[12] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention').

[13] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 ('Protocol').

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The 1951 Convention also sets out a wide range of rights that are to be afforded to refugees and, in some cases, asylum seekers. The most important of these is the non-refoulement obligation found in Article 33(1), which prohibits the removal of refugees or asylum seekers to locations where they may face persecution. The Convention also sets out various other rights for refugees in their host communities. These are provided for gradually, with some preliminary rights provided to all refugees and asylum seekers, with greater rights being afforded to those lawfully present or lawfully resident. In addition, some regional refugee instruments expand the refugee definition, to include to people subject to other forms of harm, including those fleeing 'generalised violence' or 'events seriously disturbing public order'.[14]

2.2. Human Rights Treaties

The human rights treaties negotiated alongside the *Refugee Convention* set out rights for all people, including refugees and asylum seekers. Some are particularly pertinent in that they contain express or implied complementary non-refoulement obligations which extend protection beyond non-return to persecution.[15]

Moreover, the human rights treaties set out other rights relating to the protection of asylum seekers and refugees in their host societies. International human rights law requires states to respect the rights of all individuals, including non-nationals, who are in their territories

[14] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art 1; Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, 22 November 1984), in *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc. OEA/Ser.L/V/II.66/doc. 10, rev 1, 1984–85, para III(3).

[15] See, for example, art 3(1), Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT') (express prohibition on returning a person to face torture); art 6 & 7, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 May 1976) 999 UNTS 171 ('ICCPR') (implied prohibition on returning a person to a place where there is real risk of irreparable harm, such as a threat to the right to life or torture or other cruel, inhuman, or degrading treatment or punishment). See UN Human Rights Committee, 'General Comment No 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)' (10 March 1992) para 9; Jane McAdam, 'Complementary Protection' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) *The Oxford Handbook of International Refugee Law* (OUP 2021) 661.

and/or subject to their jurisdiction, without discrimination. Key rights relevant to the protection of refugees and asylum seekers include the right to life,[16] freedom from torture and cruel, inhuman or degrading treatment or punishment,[17] the right to liberty and security,[18] and the right to procedural guarantees in court and administrative proceedings.[19] Moreover, regional human rights treaties have been concluded in many regions of the world which reinforce, and some cases, expand on these rights.[20]

2.3. Non-refoulement as a principle of customary international law

The principle of *non-refoulement* is also a principle of international customary law, binding all states, independently of specific assent.[21] Commentators have argued that the principle of non-refoulement is broader than just the protections set out in the *Refugee Convention*, also covering the proscription of return to torture or cruel, inhuman or degrading treatment or punishment under human rights law.[22] A point of contention is the question of whether there is enough uniformity in state practice for non-refoulement to be recognised as a principle of customary international law. Critics such as James Hathaway have pointed to the numerous examples of states violating non-refoulement obligations as proof of the absence of sufficiently uniform state practice.[23] However, widespread state practice and opinio juris support the view that it is clearly a norm of customary international law– particularly given that all that is requires is consistency and generality of practice (and not complete uniformity).[24]

2.4. Limits of international refugee law

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[16] ICCPR art 6; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 6.
[17] ICCPR art 7; CAT arts 2, 16.
[18] See, eg, ICCPR art 9.
[19] See, eg, ICCPR art 14.
[20] See, eg, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 ('ACHR').
[21] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12–13 December 2001, UN Doc HCR/MMSP/2001/09 (16 January 2002). The Declaration was adopted by the UN General Assembly in Office of the United Nations High Commissioner, GA Res 57/187, UN GAOR, 57th sess, Agenda Item 104, UN Doc A/RES/57/187 (6 February 2003) [3].
[22] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 87-177; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th ed OUP 2021) 301.
[23] James C Hathaway, *The Rights of Refugees under International Law* (2nd ed CUP 2021) 435-59.
[24] See, eg, Goodwin-Gill and McAdam (n 22) 300-6; Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) 46 *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* 273-327.

It is important to note a number of limitations and gaps in the international protection regime that have specific relevance to its use as a tool of constitutional interpretation. First, while the principle of non-refoulement creates an obligation for states not to return asylum seekers and refugees to harm, there is no corresponding individual right to access and enjoy asylum. While a right 'to seek and enjoy asylum' did feature in the non-binding UN Declaration on Human Rights,[25] it did not make it into the subsequent *Refugee Convention* or Human Rights treaties. Second, as flagged earlier, the Convention definition of a refugee is narrow, focusing on individuals who face a well-founded fear of being persecuted for specific reasons (the five Convention grounds). While the complementary non-refoulement obligations in the human rights treaties do fill some of the gaps for individuals facing certain types of serious harm, significant protection gaps remain.

As will be discussed further below, constitutional asylum provisions sometimes provide a much broader scope of protection than what is required under international law. Many constitutions provide an explicit individual right to access and enjoy asylum. Moreover, many provide their own refugee definition, or set out additional categories of individuals entitled to protection that go far beyond what is set out in the *Refugee Convention* and human rights treaties. Additional protections are provided in states that extend some or all of their general constitutional rights provisions to asylum seekers and refugees.

The final gap to note is that there is no treaty body with competence to issue binding rulings in relation to the interpretation of the *Refugee Convention*.[26] The Office of the United Nations Commissioner for Refugees (UNHCR) fills this gap to some extent, through its guidelines and opinions, which carry considerable weight in some courts.[27] However, the non-binding nature of this guidance leaves substantial discretion to domestic courts to interpret the state's obligations, which has led to differing approaches around the world. Moreover, there is also no international complaints body competent to hear individual complaints alleging

[25] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) ('UDHR') art 14.
[26] While art 38 of the Refugee Convention does create a mechanism for states party to refer disputes around the interpretation or application of the Convention to the International Court of Justice, this provision has never been used to date. See, also, James C Hathaway, Anthony M North, Jason Pobjoy, 'Introduction' – Special Feature: Supervising the Refugee Convention' (2013) 26(3) *Journal of Refugee Studies* 323; Anthony M North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' in Jane McAdam (ed) *Forced Migration, Human Rights and Security* (Hart 2008).
[27] Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 International and Comparative Law Quarterly 1.

breaches of the *Refugee Convention*. This underscores the importance of constitutional protections, which can be litigated and enforced by domestic courts.

3. THE DETERRENCE PARADIGM AND THE GROWING IMPORTANCE OF CONSTITUTIONAL PROTECTIONS

States around the world are increasingly turning their backs on their international obligations towards refugees. This trend has been most pronounced in the traditional refugee receiving states of the global north. While by and large, these states continue to play lip service to those obligations, they are enacting laws and policies which make it difficult, if not impossible, for asylum seekers and refugees to access protection.[28] This has been described as a turn towards a 'deterrence paradigm' in the global refugee protection regime.[29] The COVID-19 pandemic accelerated this trend, with states using the cover of the pandemic to implement restrictive measures that they may otherwise have not been able to get away with in normal times.[30]

Restrictive measures that aim to limit access to territory and limit reception rights have spread throughout the world through a process of legal and policy transfer.[31] This has been fuelled by a sense of competition, with states emulating restrictive measures adopted in comparable countries, based on a belief that if they do not follow suit, they may experience an increase in asylum flows.[32] This has resulted in a race to the bottom which risks unravelling the international protection regime. This phenomenon, while most pronounced in states of the global north, is increasingly occurring in states of the global south. States of the global south have emulated restrictive policies on their own volition,[33] as well as part of the co-operative deterrence measures with states of the global north.

These measures have been introduced with the support of the executive and legislative branches, based on a view that such measures are popular and will result in political gain at the ballot box (or in the case of some states in the global south, pressure from powerful states in their region). In this context, constitutional protections have become more important than ever

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[28] See, generally, Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (CUP 2018); Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) 69 The American Journal of Comparative Law 479; David FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (OUP 2019).

[29] Thomas Gammeltoft-Hansen and Nikolas F Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal on Migration and Human Security 28.

[30] Daniel Ghezelbash and Nickolas F Tan, 'The End of The Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2021) International Journal of Refugee Law (forthcoming).

[31] Ghezelbash (n 28) 22-28.

[32] ibid.

[33] See the example of Ecuador below.

for refugees and asylum seekers. States can easily amend their statutory obligations, and even revoke their treaty obligations. However, it is generally more difficult to amend constitutions.[34] While constitutional amendment practices vary across states, most states have a higher threshold for making constitutional changes when compared to legislative reform.[35] This has made constitutional protections more enduring and insulated from political pressures, and in some instances the last bastion of protection of refugees and asylum seekers. Yet, as the case studies examined below demonstrate, politics continues to play an important role in the process of interpreting these constitutional protections.

4. CONSTITUTIONAL ASYLUM

In most cases, state parties to *the Refugee Convention* have incorporated their obligations into domestic law through statutory provisions that apply the standards and definitions found in the Convention. However, some states have enshrined a right to seek asylum in their national constitution. These constitutional asylum clauses generally run in parallel to the statutory provisions implementing the Refugee Convention. Constitutional asylum provisions are present in around thirty-five percent of the world's national constitutions.[36] With a number of notable exceptions, constitutional asylum clauses are generally found in states whose legal tradition is closely linked to Spain, France and Portugal, while very rare in English-speaking common law jurisdictions.[37] Some states have gone further, directly incorporating all their international obligations towards asylum seekers and refugees using the constitutional block — a constitutional provision according to which international treaty obligations (and sometimes soft law instruments) are given binding constitutional status.[38]

Constitutional asylum provisions are sometimes framed in broader terms than the *Refugee Convention* and other international instruments, thus affording broader protection to those fleeing harm.[39] As noted, there is no equivalent individual right to seek and enjoy asylum in the *Refugee Convention* and human rights treaties.[40] Yet, despite these broader remits of protection, to date, they have been utilised infrequently. This has slowly begun to change in

[34] Donald S Lutz, 'Toward a Theory of Constitutional Amendment' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 237.
[35] Kowalczyk and Versteeg (n 10) 1248.
[36] Kowalczyk and Versteeg (n 10) 1224.
[37] Gil-Bazo (n 10) 23-7.
[38] See, for example, the discussion of Ecuador's approach below.
[39] Gil-Bazo (n 10) 24-5.
[40] See (n 25) and accompanying text above

the last few years, with a renewed interest around the world for using such provisions to protect and promote the rights of refugees.[41]

4.1. Explicit Right to Asylum Clauses

There is a great deal of variation across different jurisdictions in the content and form of constitutional asylum clauses. Michelle Foster and Jonathan Klaaren identify four broad approaches: 1) positive right to asylum clauses that confers a subjective right on an individual; 2) qualified right to asylum clauses conferring a subjective right to the individual, but including a condition that provides the law making branch power to define the content of the right; 3) clauses that create a negative right for refugees not to be deported (similar to the non-refoulement obligations under international law); and 4) clauses that provide for a discretionary right invested in the state (or in some instances the head of state) to grant asylum to individuals fleeing certain types of harm.[42]

A number of factors have contributed to the fact that constitutional asylum clauses have been seldom relied upon to date to realise the rights of refugees and asylum seekers. As demonstrated in the typology above, some are framed in highly conditional terms and thus provide little utility or protection in practice.[43] Even when framed in unqualified terms, there are further barriers to their use. Many of the states that have framed the right in broad terms, are either refugee producing (rather than receiving) states, or do not have the procedures or mechanisms for implementing that right in practice.[44] Another factor is the hesitancy for states to develop independent domestic constitutional-based definitions and approaches to refugee protection that may deviate from their obligations under the *Refugee Convention* and international human rights law, or where relevant, regional human rights treaties they may be party to.[45]

These limitations have meant that despite the prevalence of constitutional provisions relating to asylum, these have seldom been relied upon and consequently interrogated by constitutional courts. As noted, however, this appears to be changing, with a renewed interest on the utility and importance of such provisions. In this section, I set out two case studies where

[41] Meili 2018 and 2021 (n 1).
[42] Michelle Foster and Jonathan Klaaren, 'Asylum and Refugees' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) *Routledge Handbook of Constitutional Law* (Routledge 2012) 415-425.
[43] This is particularly the case for those provisions that fall under the second, third and fourth categories identified by Foster and Klaaren (n 42) 417.
[44] ibid 420.
[45] ibid 418.

constitutional courts have engaged with broad right to asylum provisions, with mixed results. I begin with an examination of the experience of Germany and the evolving approach of its constitutional court in interpreting the scope if the right to asylum clause. I then examine Ecuador's experience, which along with some of its Latin American neighbours has been at the forefront of the resurgence of the broad application of constitutional asylum clauses.[46] This has included drawing on not only international treaty obligations, but also soft-law instruments when interpreting the relevant constitutional provisions.

The German experience demonstrates that even states that have constitutional order friendly to international law may not always extend the ordinary approach to drawing on international law when adjudicating the constitutional rights of asylum seekers and refugees. Moreover, the German example illustrates the risks of what may occur when states interpret constitutional asylum provisions independently from their obligations under international refugee law. While initially, this approach led to the constitutional asylum provisions being interpreted generously, this gave way to a more restrictive approach in the context of rising anti-asylum seeker and foreigner sentiment. Germany also provides a rare example where the government stepped in to successfully amend the Constitution to narrow the right to asylum clause.

Germany enshrined the right to asylum in its constitution in the aftermath of World War II. Germany's constitution of 1949, known as the German Basic Law ('*Grundgesetz*') included Article 16(II)(2) which stated that the 'The politically persecuted shall enjoy the right of asylum'.[47] The inclusion of such a liberal and broad right has been explained as a reaction against the Nazi regime, the personal experiences of exile of the drafters of the constitution, and concerns about political persecution in Soviet-occupied territories.[48] The Basic Law provides for the domestic application of international law in certain circumstances. Article 25 of the Basic Law, which provides for the application of 'general rules of public international

[46] For another example, see the Colombian Constitutional Court's decision in *Revisión Oficiosa de la "Convención sobre prevención y castigo de delitos contra personas nternacionalmente protegidas", suscrita en Nueva York el 14 de diciembre de 1973, y de su Ley Aprobatoria Número 169 de diciembre 6 de 1994*, Constitutional Court, judgment No. C-396/95 (Expediente No. L.A.T. 038), of 7 September 1995, discussed in Gil-Bazo (n 10) 10.

[47] Grundgesetz für die Bundesrepublik Deutschland (GG) (Basic Law) 1949, art 16**,** cl 2, translation at <https://www.cvce.eu/content/publication/1999/1/1/7fa618bb-604e-4980-b667-76bf0cd0dd9b/publishable_en.pdf> accessed 13 March 2023.

[48] Patrice G Poutrus, 'Asylum in Postwar Germany: Refugee Admission Policies and Their Practical Implementation in the Federal Republic and the GDR Between the Late 1940s and the Mid-1970s' (2014) 49 Journal of Contemporary History 115*,* 118-9; Daniel Kanstroom, 'Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany' (1993) 18 Yale Journal of International Law 115, 193.

law' as federal German law, overriding federal and state statutes. The Federal Constitutional Court has developed the explicit principle of *Völkerrechtsfreundlichkeit* (friendliness to international law) in its jurisprudence.[49] The related principle of *völkerrechtsfreundliche Auslegung* developed by the Federal Constitutional Court, provides that statutes and the Basic Law itself are to be interpreted as consistently as possible with international law.[50]

However, this principle does not appear to have been applied when interpreting the right to asylum provision, presumably because its content and language are different to the rights and obligations under the international refugee regime. In its early case law examining Article 16(II)(2) the Federal Constitutional Court confirmed the view that the constitutional asylum provisions had a broader scope of application than the *Refugee Convention*.[51] This decision facilitated the development of a comprehensive and independent domestic jurisprudence on refugee law that took a more expansive approach to key concepts, including the definition of a refugee.

The Federal Constitutional Court shifted towards a more restrictive approach in the late 1980s. This can be viewed in the context of increasing concerns about asylum seekers and foreigners more broadly, particularly in the context of an increase in asylum seeker flows exiting the communist block.[52] The Court continued to interpret Article 16(II)(A) as operating independently from Germany's obligations under international law, but used this premise to interpret the constitutional provisions in a way that was narrower than the *Refugee Convention*. This included a 1987 decision imposing a higher threshold for what constitutes a 'well-founded fear' of persecution,[53] and a decision in 1989 excluding those who feared persecution from non-state actors from protection under Article 16(II)(A).[54]

Growing anxiety around an increase in asylum seekers following Germany's reunification in 1990 led for calls for the constitutional asylum provisions to be completely repealed. Instead, a compromise position was reached with the constitutional amendments

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[49] See, generally, Daniel Lovric, 'A Constitution Friendly to International Law: Germany and its *Völkerrechtsfreundlichkeit'* (2006) 25 Australian Year Book of International Law 75.
[50] ibid.
[51] See the comments in obiter in the 1958 decision in BVerfGE 9, 174 [180], cited in Hélène Lambert, Francesco Messineo, Paul Tiedemann 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace ?' (2008) 27(3) Refugee Studies Quarterly 16, 27. This position was confirmed in dicta in the 1980 decision in BVerfGE 54, 341 [356]; also cited in Lambert and others, 28.
[52] Poutrus (n 48) 131.
[53] BVerfGE 76, 143 [167]. To qualify, refugees were required to demonstrate a greater than 50% chance of persecution, which was much higher than the accepted threshold under international law. See Lambert and others (n 51) 29.
[54] BVerfGE 80, 315 [334], cited in Lambert and others (n 51) 30.

passed 1993.[55] The new Article 16a retained similar language to the original asylum clause, but included four additional paragraphs that significantly limited the scope of its application.[56] Most significantly, the changes prevented individuals from claiming asylum where they had travelled through or came from countries designated as 'safe'.[57] Members states of the European union where automatically deemed to be safe,[58] while the legislature was given discretion to deem other states safe where the application of the *Refugee Convention* and the *European Convention of Human Rights* were assured.[59] These changes transformed one of the simplest and most expansive constitutional asylum provisions in the Global North, to one of the most convoluted and limited.[60]

The Federal Constitutional Court upheld the constitutionality of the new provisions and the implementing legislation in a decision handed down in 1996.[61] The question of the constitutionality of the amendments was dealt with almost exclusively with reference to the requirements of the Basic Law, rather than Germany's obligations under international law. Article 79(3) of the Basic Law prohibits constitutional amendments that infringe on the objects of Article 1 relating to the protection of human dignity and Article 20 which deals with *Rechtsstaatsprinzip* (rule of law).[62] The Court found that the amendments did not violate either of these provisions and were thus constitutional.[63] When interpreting the application of the new constitutional provisions to the plaintiffs' cases, the Court had no choice but to refer to refer to international refugee law, given direct references to relevant international instruments in the text of the amendments. As already noted, one of the criteria for designating a safe third country was that the application of the *Refugee Convention* and European Convention on Human Rights was secured.[64] Moreover, the new Article 16(a)(5) made it clear that the amendments should not prejudice Germany's obligations under those two conventions.

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[55] For a general analysis and background to the constitutional amendment, see Kay Halibronner, 'Asylum Law Reform in the German Constitution' (1994) 9 American University Journal of International Law 159.

[56] 39th Amendment of the Basic Law, 28 June 1993, art 16a(1), translation at <www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=41549> accessed 13 March 2023.

[57] While the presumption that a country of origin is safe is rebuttable: art 16a(3); the designation of transit state as safe is not rebuttable: art 16a(2).

[58] ibid art 16a(2).

[59] ibid art 16a(3).

[60] Poutrus (n 60) 133.

[61] 2 BvR 1938/93; 2 BvR 2315/93.

[62] Vicki Traulsen, 'The German Federal Constitutional Court's Decision on Asylum Law' (1996) 39 German Yearbook of International Law 544, 549.

[63] Part C.II of the judgement, cited in ibid 549.

[64] Article 16(a)(2). Article 16(a)(3) also made it clear that the new provisions in the constitution did 'not affect the legal force of international law treaties of the member states of the European Communities with each other or

Nonetheless, the Court continued the approach it had adopted in earlier cases of interpreting the constitutional provisions in a way that were contrary to accepted approaches under international law and in other jurisdictions. Most significantly, the Court confirmed that the presumption that a person can find safety in a third country does not need to be individually rebuttable, and a person can be removed immediately, notwithstanding any pending legal challenges.[65] This approach was in clear contravention to the prevailing interpretations of the non-refoulement provision of the *Refugee Convention*, which requires an individual examination of the risk of refoulement in each individual case.[66] In fact, representatives from UNHCR and Amnesty International, as well as international refugee law academics were invited to present their views in the oral hearings, and all confirmed this position.[67] Nonetheless, the Federal Constitutional Court felt comfortable adopting a more restrictive approach.

The approach to Ecuador's Constitutional Court provides an interesting counterpoint. The Court has been willing to take a much more liberal approach to drawing on international refugee law and human rights law more broadly when interpreting constitutional guarantees in relation to asylum. Like a number of other Latin American states, the Ecuadorian Constitution of 2008 directly incorporates international and regional human rights instruments into domestic law. In fact, it contains more human rights provisions than any other constitution in the world.[68] This includes the stipulation that 'rights to asylum and sanctuary are recognized, in accordance with the law and international human rights instruments', as well as a prohibition of refoulement.[69] Moreover, the Constitution includes an explicit statement that 'the rights and guarantees set forth in… international human rights instruments shall be directly and immediately enforced by and before any civil, administrative or judicial servant.'[70] The

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with third States that, with due regard to the duties of the Convention on the Status of Refugees and the European Convention on Human Rights…'

[65] Part C.II.2(g)(aa) of the judgement, cited in Traulsen (n 62) 555.

[66] See, eg, Executive Committee of the High Commissioner's Programme, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum' No 30 (XXXIV) 1983.

[67] Reinhard Marx and Katharina Lumpp, 'The German Constitutional Court's Decision of 14 May 1996 on the Concept of Safe Third Country' (1996) International Journal of Refugee Law 419, 419 fn 2.

[68] Ecuador topped the rankings with 99 human rights in 2016. See Comparative Constitutions Project, *Constitution Rankings* (last updated April 8, 2016) <http://comparativeconstitutionsproject.org/ccp-rankings/> accessed 13 March 2023.

[69] Constitution of the Republic of Ecuador (2008) art 41, translation at <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> 13 March 2023.

[70] Constitution of the Republic of Ecuador (2008) art 11(3); Similarly, art 417 states that 'The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied.'; art 424 states 'The Constitution and international human rights treaties ratified by the State that recognize rights that are more

Constitution further declares that international treaties ratified by Ecuador prevail over an conflicting laws and Constitutional provisions.[71] The Ecuadorian Constitutional Court relied on these provision in 2014 to strike down Presidential Decree No 1182 that sought to limit access to asylum.[72] The decree in question modified the refugee definition to reduce the categories of individuals who would be able to access to protection and introduced strict time limits for lodging asylum claims and appeals. The Court's approach to examining the time limits is discussed in the section on due process below. In relation to the changes to the refugee definition, the court found these to be unconstitutional as they were in contravention to Ecuador's international obligations. Here, the Court relied on the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) that provides a much broader definition of a refugee than what is found in the *Refugee Convention*.[73] In particular, this broader definition includes individuals fleeing generalised violence, which was particularly relevant to Ecuador's situation given the large numbers of asylum seekers it was hosting who had fled armed conflict in Colombia. The Court ordered the reinstatement of the broader definition into Ecuadoran asylum law.[74] In reaching this conclusion, the Court noted that Article 11(3) of the Ecuadoran Constitution incorporates international human rights instruments into Ecuadoran domestic law, and that the Cartagena Declaration is such an international human rights instrument.[75] This was despite the fact that the Declaration itself was framed as non-binding agreement. The Court's conclusion also drew on the international law principle of *non-refoulement,* which is explicitly incorporated in Article 41 of the Constitution.[76]

4.2. An Implied Protection Against Refoulement

There have been a number of attempts in recent years to read an implied protection against refoulement into domestic constitutions. Interestingly, these have often taken place in states which are not party to the *Refugee Convention*, relying on the status of the non-refoulement obligations as part of international customary law. In this section, I examine the evolving

favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power'.

[71] Constitution of the Republic of Ecuador (2008) art 124.

[72] Sentencia N. 002-14-Sin-CC, Case No.: 0056-12-IN y 0003-12-IA, August 14, 2014 ('*Ecuadorian Constitutional Court decision*'). For an in-depth analysis of this decision, see Steve Meili, 'The Human Rights of Non-Citizens: Constitutionalised Treaty Law in Ecuador' (2017) 31 Georgetown Immigration Law Journal 347, 376-79.

[73] Declaración de Cartagena sobre Refugiados, adopted during the Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios, held in Cartagena, 19-22 November 1984.

[74] Ecuadorian Constitutional Court decision [51] – [52], cited in Meili (n 72) 377.

[75] ibid.

[76] ibid.

approach to this question taken by the Supreme Court and High Courts of India. While India is not a party to the *Refugee Convention* or protocol, the Supreme Court and High Courts of India have, nonetheless intervened in numerous cases over the years to prevent the return of asylum seekers to potential harm. More recently, the Supreme Court has adopted a restrictive approach and explicitly disavowed the relevance of international refugee law in Indian constitutional law.

In a number of cases in the 1980s and 1990s, the Indian Supreme Court stepped in to stay deportations pending refugee status determination procedures being carried out by UNHCR.[77] These often took the form of short interlocutory judgements that did not engage with international obligations in detail. The Supreme Court has also emphasised India's international obligations as well the applicability of constitutional rights in cases which dealt with the rights of refugees residing in India. For example, in *Khudiram Chakma v State of Arunachal Pradesh,* which dealt with the forced eviction of Chakma refugees from Bangladesh, the Court emphasised India's obligations under Article 14 of the *Universal Declaration of Human Rights* which creates an individual right to seek and enjoy asylum. In a subsequent case brought on behalf of the Chakma refugee, the Supreme Court confirmed that foreigners (including asylum seekers) in India are entitled to the protection of Article 21 of the Constitution that states that 'no person shall be deprived of his life or personal liberty except according to a procedure established by law'.[78]

The Gujarat High Court went one step further in its 1999 decision in *Ktaer Abbas Habib Al Qutafi v Union of India,* by reading in the principle of *non-refoulement* into Article 21.[79] Two Iraqi minors, both of whom had been identified as refugees by UNHCR, lodged a special civil application seeking a stay of deportation and their release from detention. In allowing the special civil application, the Court took an expansive approach to the role of international law, and refugee law more specifically, in interpreting the Indian Constitution. The starting point of the Court's reasoning was to reaffirm the Supreme Court's finding in *Khudiram Chakma v State of Arunachal Pradesh* that the guarantee of life and personal liberty in Article 21 of the Constitution applied to non-citizens on Indian soil.[80] While noting that there were no domestic

[77] See, for example, *N.D. Pancholi v State of Punjab and Others, Writ Petition (Criminal) No 243 of 1988, 9 June 1988 (for Prel. Hearing) (Supreme Court of India)* (staying the deportation of a refugee from Iran); *Malavika Karlekar v Union of India*, Writ Petition (Criminal) No 583 of 1992, 25 September 1992 (Supreme Court of India) (staying the deportation of 21 Burmese nationals from the Andaman Islands).
[78] *State of Arunachal Pradesh v Khudiram Chakma*, 1994 AIR 1461 (Supreme Court of India).
[79] *Ktaer Abbas Habib Al Qutafi v Union of India* 1999 CriLJ 919 (Gujarat High Court) ('*Ktaer*').
[80] ibid [11], [19].

laws in India obliging the state to implement or enforce international treaties and conventions,[81] the Court stated that such sources from international law may be referred to as interpretive tools when examining the scope of fundamental rights set out in the Constitution.[82] The Court referred to the Indian Supreme Court's decision in *People's Union for Civil Liberties v Union of India*,[83] which had held that provisions of the Covenant of Civil and Political Rights, which 'elucidate and go to effectuate the fundamental rights guaranteed under our Constitution can be relied upon by the Courts, as facets of those fundamental rights and hence, enforceable as such.'[84] This position was further supported with reference to Article 51(c) of the constitution that places a duty on the State to endeavour to 'foster respect for international law and treat obligations in the dealing of organised people with one another'. This opened the door for the Court to draw on a wide range of international refugee law sources, including the *Universal Declaration of Human Rights*,[85] the *Refugee Convention*,[86] as well as scholarly opinions that the non-refoulement principal forms part of general international law, binding on all states independently of specific assent.[87] Based on its reading of these varied sources, the Court concluded that:

> [t]he principle of 'non-refoulement' is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to… national security.[88]

The Delhi High Court adopted a similar approach in its 2016 decision in *Dongh Lian Kham v. Union of India* to conclude that Article 21 extended to prohibiting non-refoulement.[89]

This liberal approach to drawing on international refugee law in constitutional interpretation in these earlier cases can be contrasted with approach taken in the 2021 Indian Supreme Court decision in *Mohammad Salimullah v Union of India*.[90] The case was an opportunity for the Court to address the broader question of the role of public international law

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[81] ibid [19].
[82] ibid.
[83] *People's Union for Civil Liberties v Union of India* 1997 AIR SC 1203.
[84] *Ktaer* (n 79) [13].
[85] ibid [7].
[86] ibid [18].
[87] ibid.
[88] ibid.
[89] *Dongh Lian Kham v. Union of India*, 226 DLT 208 (Delhi High Court 2016).
[90] *Mohammad Salimullah v Union of India,* Writ Petition (Civil) No 793 of 2017, 30 August 2017 (Judgement on 8 April 2021) (Supreme Court of India).

in constitutional interpretation.[91] However, the Court chose not to engage with this issue in detail, declaring the inapplicability of non-refoulement in Indian law in a short judgement which emphasised national security concerns. The case dealt with an interlocutory application by two Rohingya refugees to secure their release from detention and prevent their deportation from India. The writ of petition was filed in 2017 in response to a direction from the Indian government to identify 'illegal immigrants' including Royingya refugees and promptly commence deportation proceedings.

The Supreme Court dismissed the application in April 2021, rejecting the proposition that the non-refoulement obligation could be read into the Indian Constitution. The Court did note that 'there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law.'[92] However, the Court declined to draw on the *Refugee Convention*, given that India was not a signatory.[93] The Court did not engage with the claim raised by the petitioners that non-refoulement formed part of customary international law, nor the question of whether the removal of Rohingya refugees would violate the non-refoulement obligations under the ICCPR and other human rights treaties to which India is party.[94] While the Court did confirm that Article 21 applies to non-citizens, this did not extend to a right to reside or settle in India, which is only available to citizens.[95] In reaching this decision, the Court appeared to place heavy weight on contentions by the government that the presence of Rohingya refugees in India was a threat to security, and that their passage to India was being facilitated people smugglers. Both the outcome and focus on nationality security concerns over the rights of refugees stands in stark contrast with the earlier decisions of the Supreme Court and High Courts of India described above. This has been explained by some commentators as the result of political pressure from the Hindu-nationalist and anti-Muslim rhetoric and policies of the Modi government.[96]

5. OTHER CONSTITUTIONAL RIGHTS

[91] Khagesh Gautum, 'The Use of International Law in Constitutional Interpretation in the Supreme Court of India' (2019) 55 Stanford Journal of International Law 27, 33.
[92] *Mohammad Salimullah* (n 90) [12].
[93] Ibid.
[94] Brief for the Petitioners, Mohammad Salimullah v. Union of India, Writ Petition (Civil) No. 793 of 2017 (Diary No. 27338-2017), quoted in Gautam (n x) 30-31.
[95] *Mohammad Salimullah* (n 90) [9], [13]
[96] Jay Ramasubramanyam, 'India is chipping away at its past generosity to refugees' (*Refugee Law Initiative Blog*, 6 May 2021) <https://rli.blogs.sas.ac.uk/2021/05/06/india-is-chipping-away-at-its-past-generosity-towards-refugees/> accessed 13 March 2023.

The impact of the international refugee regime on constitutional interpretation extends beyond constitutional right to asylum clauses. International refugee law and related human rights instruments have influenced the interpretation of other constitutional provisions that provide for individual rights. This has occurred in the context of cases where courts have considered the application of these protections to non-citizen including refugees and asylum seekers. We see a significant degree of variation in the way that states have approached the issue of the reach of constitutional rights provisions. Some constitutional courts have explicitly drawn on international human rights principles to take a universal approach that sees those rights as applying to anyone in the state's territory, including asylum seekers and refugees. Others have taken a 'constitutional exceptionalism' approach,[97] sidelining international law, and limiting the scope of certain constitutional rights to citizens or individuals with regularised immigration status. In this section, I will examine how this has played out in relation to two key issues that have been particularly important for asylum seekers: constitutional due process guarantees and constitutional limits on detention.

5.1. Due Process

The *Refugee Convention* and related human rights provisions do not provide proscriptive guidance as to how states should assess and review asylum applications, with the choice of means of implementation left to the discretion of states. This discretion has been exploited by states, with the implementation of measures that impose strict time limits and limit access to review.[98] Such measures have provided fertile ground for legal challenges based on constitutional due process protections. In this section I contrast the approaches of the US Supreme Court and Ecuadorian Supreme Court in dealing with such challenges.

The US Supreme Court has shown a particular reluctance on drawing on international law in interpreting the rights protections set out in the US Constitution. While recent years have seen the willingness to draw on such sources as non-binding comparative examples in cases dealing with the rights of citizens,[99] this has not extended to cases dealing with the rights of asylum seekers and refugees. In fact, the Court has repeatedly reaffirmed the 'plenary power doctrine' to preclude unauthorised aliens, including asylum seekers, from accessing

[97] Lester (n 1).
[98] Daniel Ghezelbash, 'Fast-Track, Accelerated, and Expedited Asylum Procedures as a Tool of Exclusion' in Catherine Dauvergne (ed) *Research Handbook on the Law and Politics of Migration* (Elgar, 2021) 246, 248-9.
[99] See Harold Koh, 'International Law as Part of Our Law' (2004) 98 *The American Journal of International Law* 43 (discussing the role international human rights law has played in interpreting the Eight Amendment); Gerald Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 *The American Journal of International Law* 82.

constitutional rights or review the compatibility of federal immigration statutes with constitutional restraints.

This is particularly evident in the Court's jurisprudence as to whether the Fifth Amendment Due Process Clause applies to unauthorised aliens. The Fifth Amendment Due Process Clause provides that '[n]o person shall … be deprived of life, liberty, or property, without due process of the law'.[100] The development of the plenary power doctrine, and the Court's reliance on it to preclude access to the Due Process Clause can be traced back to a line of decisions dealing with challenges to laws designed to exclude and deport Chinese nationals in the latter part of the nineteenth century.[101] These distinguished between excludable aliens seeking entry at the border (who had no constitutional rights in the immigration context) and aliens who had 'entered' the United States and had subsequently been placed in deportation proceedings, who could rely in a limited way on the Due Process Clause.[102] Subject to minor exceptions, the doctrine remains relatively unchanged to this day and the fault line continues to be based on notions of entry and non-entry.[103] This has made US immigration law 'a constitutional oddity', which has developed in isolation from mainstream American public law,[104] as well as international refugee law.

A recent example of the enduring impact of the plenary power doctrine was the Supreme Court's decision in *Department of Homeland Security et al v Thuraissigiam.*[105] The Court relied on the plenary power doctrine to uphold rapid removal procedures and confirmed that asylum seekers do not need to be given access to a federal court hearing before removal from the United States. The case dealt with a constitutional challenge to the Illegal Immigration Reform and Immigrant Responsibility Act ('IIRIRA') and in particular, provisions which provided for the expedited removal of certain asylum seekers seeking entry into the United States.[106] The law provides for the mandatory detention of certain asylum seekers pending a preliminary screening by an asylum officer as to whether they have a 'credible fear of persecution'.[107] Those found to hold such a credible fear are allowed to remain in the country

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[100] United States Constitution amend V ('Due Process Clause').
[101] See, eg, *Chae Chan Ping* 130 US 581 (1889); *Nishimura Eiku v United States* 142 US 651(1892).
[102] See, eg, *Yamataya v Fisher* 189 US 86 (1903).
[103] The one notable caveat to this rule relates to returning former long-term residents who may in certain circumstances be entitled to limited due process rights even where they had not 'effected an entry': *Landon v Plasencia,* 459 US 21 (1982).
[104] Stephen Legomsky, 'Immigration Law and the Principle of Plenary Congressional Power' (1984) *Supreme Court Review* 255, 255.
[105] 140 SCt 1959 (2020).
[106] 8 USC § 1225(a)(1).
[107] § 1225(b)(1)(B)(v).

to have their full claims assessed, while those that do not face immediate removal. The law provided for a limited review of the credible fear determination by an immigration judge. However, IIRIRA explicitly limits further review in the federal courts, including a review of the determination as to whether the individual holds a credible fear, or petitions for habeas corpus.[108] The case was brought by a Sri Lankan asylum seeker who sought to challenge the limitations on judicial review on the grounds that they violated the Fifth Amendment Due Process Clause and the Suspension Clause (which prohibits the suspension of access to habeas corpus).[109]

A majority of the Court dismissed both grounds and upheld the constitutionality of the procedures and limits on judicial review.[110] The Court confirmed the continued applicability of the plenary power doctrine in denying access to the Due Process Clause. Justice Alito, delivering the opinion of the Court, stated that:

> [w]hile aliens who have established connections in this country have due process rights in deportation proceedings, the court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause.

When interpreting the Suspension Clause, the Court limited its analysis to the 'writ [of habeas corpus] as it existed in 1789' when the Constitution was drafted.[111] This not only ruled out the possibility of using international refugee and human rights law as an interpretive tool, but also US and international practice following that date. On this basis, it was concluded that the writ could not be relied upon to claim the right to enter or remain in a country or to obtain judicial review potentially leading to that result.[112]

The decision of the Ecuadorian Supreme Court in relation to Presidential Decree 1182, which included a similar attempt at expediting asylum procedures, provides an interesting contrast.[113] In addition to limiting the scope of the refugee definition, the Presidential order shortened time periods for filing asylum claims and appeals. The time limit for applying for

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[108] USC § 1252(e)(2); § 1252(a)(2)(A)(iii).
[109] United States Constitution art I, § 9, cl 2.
[110] Alito J delivered the lead opinion which Roberts CJ, and Thomas, Gorsuch and Kavanaugh JJ joined); with concurring opinions from Thomas J, Breyer J (joined by Ginsburg J); with a dissenting opinion form Sotomayor (joined by Kagan J).
[111] 140 SCt 1959, 1969 (2020).
[112] Ibid 1974.
[113] Ecuadorian Constitutional Court decision, see (n 72) and accompanying text above.

asylum was reduced from 90 days after arrival in the country to 15 days, while the time to appeal a rejected asylum claim was reduced from 15 to three days.[114] Although the petitioners had raised claims that the new time limits violated the Due Process Clause of the Constitution,[115] the Court chose to rely on constitutional guarantees relating to equality and non-discrimination drawn from international human rights law to find the procedures unlawful.[116] Article 11(1) of the Ecuadorian Constitution provides that all persons are equal and shall enjoy the same rights and opportunities. Article 11(2) goes on to explicitly prohibit discrimination on the basis of numerous categories, including ethnicity, place of birth and migratory status. These provisions directly draw on similar rights set out in international and regional human rights instruments to which Ecuador is party, including the UDHR, ICCPR, ICESCR and ACHR.[117]

The Court determined that the time limits introduced by the Presidential decree were inadequate to allow access to the refugee process.[118] Moreover, the Court reasoned that the time limits created 'an unjustified difference' with other administrative procedures:

> The time limits [imposed by Decree 1182] violate the right of equality, in that an unjustified difference exists between these time periods and those [established] for the common administrative procedures, considering that both provide the protection of subjective rights in the substantiation process"[119].

This is a significant affirmation of the universal conception of constitutional rights as equally applying to citizens and non-citizens. As Stephen Meili notes, the Court effectively 'equated refugees with citizens in terms of the need for fairness…'.[120] That is in stark contrast to the US Supreme Court jurisprudence which justifies discriminatory access to rights based on migration status.

5.2. Detention

[114] Presidential Decree No 1182, cited in Meili (n 72) 349.
[115] The brief for Asylum Access Ecuador, which was one of the petitioners, argued that the shortened time frames violated the right to due process in article 36 of the Constitution: Brief of Asylum Access Ecuador (Oct. 26, 2012), cited in Meili (n 72) 372 fn 124.
[116] Ecuadorian Constitutional Court decision 49, cited in Meili (n 72) 376.
[117] See, for example, UDHR art 1, ACHR art 24, ICCPR art 26, ICESCR art 2(2).
[118] Interestingly, the Court did not specifically reference any international human rights instrument or its own constitutional provisions guaranteeing the right to asylum on this point: Meili (n 72) 376 fn 141.
[119] Ecuadorian Constitutional Court decision 49, translated in Meili (n 72) 376.
[120] Meili (n 72) 376.

Many states have subjected asylum seeker to mandatory, long-term, and sometimes even indefinite detention. Detainees have turned to constitutional protections in a bid to challenge their detention. In this section, I contrast the approach taken by the Supreme Court of Papua New Guinea ('PNG') in striking down detention policies as unconstitutional, with that of the Australian High Court that has repeatedly upheld the validity of long-term and even potential indefinite detention of asylum seekers and refugees. Again, we see a clear difference in approach between states where the courts embrace international refugee and human rights law as tool of constitutional interpretation, as opposed to those which do not.

In the 2016 decision in *Namah v Pato,* the Supreme Court of PNG directly drew on international refugee and human rights law to find that the detention of asylum seekers was unlawful.[121] The Court found that the detention of asylum seekers in the Australian-funded 'processing' centres was unconstitutional as it was in breach of the Constitution's right to liberty clause. The Court explicitly drew on various international refugee and human rights law treaties, as well as soft law instruments in reaching this conclusion. Australia and Papua New Guinea had entered into memorandums of understanding, providing for the transfer of certain asylum seekers from Australia to Papua New Guinea to have their asylum claims processed.[122] Pursuant to a Ministerial declaration, the asylum seekers were required to be detained at the Manus Island Processing Centre ('MIPC').

The case required the Court to determine two constitutional questions. The first was whether the detention fell under one of the existing exceptions to the right to liberty in the Constitution. Article 42 of the Constitution provides that '[n]o person shall be deprived of his personal liberty' unless they fall under one of a number of enumerated exceptions. The government had sought to rely on article 42(1)(g), which provided an exception where the purpose of detention was for:

> preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes.

[121] *Namah v Pato* [2016] PGSC 13 ('*Namah v Pato*').
[122] The first MOU was signed on 8 September 2012, with a subsequent MOU concluded on 6 August 2013: see ibid, 4.

The Court was of the view that this exception did not apply in the case before them, as it was clear that the asylum seekers had no intention of entering or remaining in PNG. Given that their destination was and continued to be Australia, and that they were brought to PNG against their will, the detention could not be construed as for the purpose of preventing unlawful entry or facilitating removal.[123] In interpreting the meaning of Article 42, the Court referred to various sources of international human rights law. This included earlier decisions where it had drawn on the similar provisions of Article 5 of the *European Convention of Human rights*,[124] as well as references to UNHCR's Detention Guidelines and the findings of a UNHCR report stating that conditions at that MIPC did not meet those guidelines.[125]

The second constitutional question related to the validity of a constitutional amendment, introduced in response to the litigation, which sought to insert a new exception to the right to liberty, where detention was:

> for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves.[126]

The Court found this amendment invalid, as it had not conformed to the requirements set out in the Constitution for making amendments which curtail rights and freedoms. The Constitution required that government demonstrate that such amendments were 'reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'.[127] The Constitution further provides that when determining this question, the Court must have regard to various international treaties and soft law instruments including the Charter of the United Nations, the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; the European Convention for the Protection of Human Rights and Fundamental Freedoms, and '*any other international conventions, agreements or*

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[123] ibid 15-16.
[124] ibid 13, quoting Cory J's comment in *Application of Ireeuw* (1985) PNGLR 430 ('*Ireeuw*'), relying on the European Union Court in *Guzzardi v Italy* 2 EHRR 333.
[125] Detention Guidelines, Guidelines on the Applicable Standards relating to the Detention of Asylum Seekers and Alternatives to Detention; UNHCR Mission to Manus Island, Papua New Guinea, 15-17 January 2013: cited in *Ireeuw* (n 124) [27].
[126] Constitution of the Independent State of Papua New Guinea, art 42(1)(ga).
[127] ibid art 38(1)(b).

declarations concerning human rights and fundamental freedoms'.[128] The Court concluded that the constitutional amendment in question was invalid as the government had not met its burden to demonstrate that it was reasonably justifiable with reference to the criteria enumerated above.[129] In reaching this conclusion, the Court explicitly referred to PNG's obligations under the *Refugee Convention.* The Court noted the extensive reservations that PNG had made when ratifying the Convention, but concluded that these did not 'excuse PNG from its international obligations.'[130]

The approach of the Papua New Guinea Supreme Court stands in stark contrast to the way the Australian High Court has dealt with the issue of the detention of asylum seekers. With no bill of rights, Australia's constitution is notoriously light when it comes to the inclusion of individual rights.[131] Moreover, the Australian High Court has generally taken a very restrictive view when it comes to drawing on international law in the process of constitutional interpretation.[132] These limitations were demonstrated in the 2004 decision in *Al-Kateb v Godwin* ('*Al-Kateb*').[133] The case was a challenge to the ongoing detention of a stateless Palestinian asylum seeker whose refugee claim was denied, but could not be deported as no country was willing to accepts his return. The relevant provisions of Australia's *Migration Act* stated that 'unlawful non-citizens' were to be held in detention until removal from Australia at their own request, deportation or grant of a visa.[134] The question before the Court was two-fold: did the detention provisions, when properly construed, purport to authorise the potential indefinite detention of non-citizens in circumstances where there were no real prospects of removal? If so, were the provisions constitutionally valid? The majority of the High Court in *Al-Kateb* answered both these questions in the affirmative, effectively giving the green light to potential indefinite administrative detention. On the issue of statutory construction, McHugh, Hayne, Callinan and Heydon JJ found that the relevant legislative provisions authorised detention until a detainee was removed, deported or given a visa, no matter how long that may

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[128] Ibid art 39(a)-(j) (emphasis added).
[129] *Namah v Pato* (n 121) [53]-[54].
[130] ibid [67].
[131] See, generally, George Williams, *A Bill of Rights for Australia* (New South Publishing 2000).
[132] For an overview of the approach of the High Court in this regard, see Kristen Walker, 'International Law as a tool of Constitutional Interpretation' (2002) 28 Monash Law Review 85; Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 Melbourne University Law Review 95.
[133] (2004) 219 CLR 562.
[134] Australia, *Migration Act 1958*, s 189 (providing for the mandatory detention of unlawful non-citizens). Under s 196(1) of the *Migration Act* as it stood at the time, a person who had qualified for immigration detention had to be kept there until the person was (a) removed from Australia under section 198 or 199; or (b) deported under section 200; or (c) granted a visa.

take.[135] As the words of the relevant sections were clear,[136] there was no place to consider interpretive principles such as the principle of legality, or compatibility with international law.[137]

On the second question, the majority concluded that the statutory regime which provided for potentially indefinite detention did not raise any constitutional concerns. The Court's view was that the legislative power to make laws with respect to naturalisation and aliens,[138] was broad enough to authorise the making of laws cover such detention. Most relevant for the present discussion, however, was the way the Court dealt with the argument that the laws violated the constitutional separation of powers doctrine. While the Australian Constitution does not provide for an individual right to liberty, it does exclusively vest the power to order punitive detention in the judiciary.[139] It was argued that indefinite detention at the discretion of the executive would be punitive and thus unconstitutional.

The majority rejected such a construction, reasoning that even if there was constitutional immunity from administrative deprivation of liberty for citizens, the Court's broad reading of the aliens power created a general constitutional exception for non-citizens subject to immigration detention.[140] The three dissenting judges took a contrary view, finding the legislation ambiguous, and reading it down so as to not authorise ongoing detention where removal is not possible. This was based on the view that the alternate interpretation would authorise detention amounting to punishment, which was the exclusively the responsibility of the judiciary.[141]

However, of the dissenting justices, it was only Kirby J who drew on international human rights law when reaching this conclusion. In doing so, Kirby J relied on the interpretive principle he had developed in earlier cases:

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[135] *Al-Kateb* (2004) 219 CLR 562, 581 [35] (McHugh J), 640 [231] (Hayne J), 661–2 [298] (Callinan J). Note that McHugh, Hayne and Callinan JJ each delivered separate judgments, with Hayden J substantially concurring with Hayne J.
[136] ibid 643 [241] (Hayne J) (words were 'intractable' in providing for indefinite detention).
[137] See, eg, ibid 661–2 [298] (Callinan J).
[138] Australian Constitution, art 51(xix).
[139] Australian Constitution, Chapter III.
[140] Al-Kateb (n 135) 648–9 [257]–[261] (Hayne J), 584–5 [44]–[46] (McHugh J).
[141] ibid 617 (Kirby J).

> To the full extent that its text permits, Australia's *Constitution,* as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights.[142]

This opened the door for Kirby J to interpret the constitutional limits on detention with reference to international obligations protecting personal liberty, with Kirby J citing a wide range of instruments including, Articles 7, 9 and 10 of ICCPR, Art 31 of the Convention relating to the Status of Stateless Persons; Article 9 of the UDHR, and CAT. This led to the conclusion that 'indefinite detention at the will of the Executive … is alien to Australia's constitutional arrangements'.[143] It should be noted, however, that such an approach to drawing on international human rights law in constitutional interpretation has not gained much support from other High Court judges. In fact, in *Al Kateb,* McHugh J devoted a significant portion of his judgement to criticising such a position, noting that:

> [C]ontrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900… [Such a claim] has been decisively rejected by members of the Court on several occasions. As a matter of constitutional doctrine, it must be regarded as *heretical.*[144]

The decision in *Al-Kateb*, paved the way for a series of decisions upholding the long term detention of asylum seekers in Australia,[145] as well as well challenges to Australia's involvement in the detention of asylum seekers offshore in PNG and Nauru.[146] However, the High Court recently shifted its approach in its 2023 unanimous judgement in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs.*[147] The Court reopened and overruled the constitutional holding in *Al-Kateb*, finding that the detention provisions amounted to punishment in contravention the separation of powers in the Constitution. In doing so, it appeared to take a more universalist approach to constitutional interpretation, rejecting the notion that there was a constitutional exception for non-citizens subject to immigration

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[142] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-8.
[143] Al-Kateb (n 135) 615 [146].
[144] ibid 589 (McHugh J).
[145] See, eg, Plaintiff M76 (2013) 251 CLR 322.
[146] See, eg, Plaintiff 156/2013 v Minister for Border Protection (2014) 254 CLR 28. For a detailed comparison of the approaches taken by the Australian, Papua New Guinean and Nauruan courts on this point, see Thomas Spijkerboer, 'Coloniality and Case Law on Australian Asylum Offshoring Scheme' (2023) 7(2) International Journal of Migration and Border Studies 132.
[147] [2023] HCA 37 (28 November 2023).

detention.[148] The Court made it clear that the constitutionally permissible period of detention comes to an end 'when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future'.[149] Interestingly, the Court made no references to international law in the course of its constitutional interpretation.

6. CONCLUSION

The foregoing analysis demonstrates four broad approaches to drawing on international refugee law in constitutional interpretation reflecting different approaches to incorporating international law into the domestic constitutional order. First are the states that have directly incorporated the relevant international obligations in their domestic constitutions. It is in such states that international refugee law has had the most direct impact on constitutional interpretation. Ecuador's wholesale inclusion of its international obligations in its Constitution paved the way for its Constitutional Court to draw on refugee and human rights instruments, whether binding or not, to interpret the right to asylum provisions broadly, and to strike down time limits for making asylum applications and limits on review.[150] In Papua New Guinea, the direct incorporation of the consideration of international refugee and human rights instruments into the criteria for making changes to the constitution, paved the way for the Court to strike down constitutional amendments aimed at authorising the detention of certain asylum seekers and refugees.[151] Importantly, in both those cases, the courts were willing to draw on not only binding international treaty obligations, but also soft law instruments, when interpreting the legality of the policies in question. As a result of such an approach, the courts in Ecuador and Papua New Guinea confirmed the universal application of constitutional protections as applying to citizens and non-citizens equally.

Second are states that allow for international law to be drawn upon as a binding interpretive tool. Germany fell into this category. There we saw international refugee and human rights law being drawn upon in constitutional interpretation in a highly inconsistent manner. This is evident in the approach of the German Federal Constitutional Court in interpreting the country's constitutional asylum clause. Despite the long-standing principle developed by the Court that provides for the use of international law in constitutional interpretation, the Court has repeatedly interpreted the constitutional right to asylum provisions

[148] Ibid [48]
[149] Ibid [55].
[150] See discussion in Section 4.1.
[151] See discussion in Section 5.2.

in a way that was out of step with developments under international refugee law.[152] As a result, the Court adopted an approach to drawing on international law in cases involving asylum seekers and refugees which deviated from the standard approach it has taken in other context.

Third are states where international law can only be drawn on as non-binding comparative practice. Here, again, the case studies showed a significant difference in cases involving the rights of citizens as opposed to asylum seekers or other unauthorised arrivals. The United States is illustrative in this regard. The US Supreme Court had accepted a limited role for drawing on international law as a non-binding source in constitutional interpretation in cases involving the rights of citizens.[153] This has not occurred in cases involving asylum seekers, particularly those who arrive in the United States without authorisation. This has facilitated the enduring application of the plenary power doctrine that prevents unauthorised arrivals from accessing certain constitutional protections, including due process rights. We see a similar pattern in emerge in the approach of the Supreme Court of India. The Court's earlier acceptance of drawing on international obligations when interpreting fundamental rights was not applied when addressing the rights of refugees and asylum seekers to remain in the country.

Finally, there are states that take the explicit view that international law has no role in constitutional interpretation, thus completely ignoring their obligations under international refugee law. This the case in Australia, and it thus comes as no surprise that the High Court of Australia has completely sidelined international refugee law obligations in constitutional interpretation.[154]

In summary, the role and influence of international refugee law and related international human rights law protections on constitutional interpretation appears to be determined by two main related factors. The first is the degree to which these principles have been incorporated into domestic constitutions and the Courts' general approach to drawing on international law sources in constitutional interpretation. The second, and related question, relates to the willingness of courts to interpret constitutional rights in a universal manner, applying to everyone regardless of their immigration status, or limiting their scope to citizens or those with regularised status. At least in the case studies examined here, it was only in those states which directly incorporated their international refugee law and human rights obligations into their domestic constitutions that constitutional courts have been willing to consistently interpret

[152] See discussion in Section 4.1.
[153] See discussion in Section 5.1.
[154] *Al-Kateb* (n 135); *NZYQ* (n 147).

constitutional rights in a universal manner, viewing asylum seekers as the same level as citizen when it came to their status as constitutional rights holders. While some states, such as the United States have consistently adopted the exceptionalist approach to interpreting constitutional rights, Australia provides an interesting example where the High Court has recently showed signs of shifting away from its long standing exceptionalist approach. In contrast, the examples from Germany and India demonstrate that political considerations may have influenced some constitutional courts to shift from a universalist to an exceptionalist approach over time.

It thus appears that the deterrence paradigm and global trend towards minimising and evading international obligations towards asylum seekers and refugees identified in section 3, may also be influencing the way some courts are approaching constitutional interpretation. The resulting constitutional exceptionalism has ramifications far beyond the application of constitutional protections to refugees and asylum seekers. History has shown that giving a green light to exceptional treatment of refugees or non-citizens more broadly, can generate a 'spill over' effect, with those exceptions being expanded over time to erode the constitutional rights afforded to citizens.[155]

[155] Timnah Baker, 'Noncitizen Litigation in the Evolution of Constitutional Rights Discourse in the United States' (PhD thesis, University of Sydney 2021; Mary Crock, 'Defining Strangers: Human Rights, Immigrants and the Foundations of a Just Society' (2007) 31(3) Melbourne University Law Review 1053.